

GREGORY K. FORD
Claimant

LANDOLL CORPORATION
Respondent

NATIONAL UNION FIRE INSURANCE CO. N.Y.
Insurance Carrier

ORDER

APPEARANCES

RECORD AND STIPULATIONS

ISSUES

Judge Benedict awarded claimant a 50 percent permanent partial general body disability and temporary total disability benefits for 18.37 weeks, which included several weeks following April 1, 1996. At oral argument before the Appeals Board, the parties narrowed the issues to the following:

- (1) What is the nature and extent of claimant's injury and disability?

Claimant contends the judge erred by finding that he failed to prove the percentage of task loss and, therefore, argues that he is entitled to a higher permanent partial general disability.

On the other hand, the respondent and its insurance carrier contend that claimant is grossly exaggerating his symptoms and that he did not sustain any permanent functional impairment or injury as a result of the November 15, 1995, work-related accident. Also, they contend that respondent offered claimant an accommodated job in April 1997 and that claimant's failure to accept that job prevents him from receiving any permanent partial disability benefits greater than the functional impairment rating.

- (2) How many weeks of temporary total disability benefits is claimant entitled to receive?

Respondent and its insurance carrier contend claimant reached maximum medical recovery as of April 1, 1996, and, therefore, they should receive a credit for any temporary total disability benefits paid after that date.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

- (1) The parties stipulated that on November 15, 1995, Gregory K. Ford injured his back while working for Landoll Corporation. On that date, the pry bar Mr. Ford was using slipped and he felt a pop in his back.
- (2) From the date of accident until January 11, 1996, Mr. Ford worked light duty grinding parts. After that date, he was off work for medical treatment and received temporary total disability benefits.
- (3) Because of the financial problems caused by being unable to work, in March 1996 Mr. Ford moved from Marysville, Kansas, where he worked for Landoll Corporation, to Haddam, Kansas, where he could live rent-free. Haddam is approximately 60 miles from Marysville.

(4) On approximately April 1, 1996, board-certified orthopedic surgeon David K. Ebelke, M.D., examined Mr. Ford and found him to have reached maximum medical improvement.

(5) In May 1996, Mr. Ford applied for unemployment benefits. During a hearing in that claim, Mr. Ford offered to return to work for Landoll. But the company advised it did not have a position for him. Mr. Ford received unemployment compensation between May and August 1996.

(6) In January 1997, Mr. Ford injured his neck in an incident unrelated to the November 1995 back injury. Also, in January 1997, Mr. Ford began receiving \$180 per month in assistance from SRS, along with medical assistance for the neck injury.

(7) By letter dated April 2, 1997, Landoll's attorney offered Mr. Ford an opportunity to return to work for Landoll as an assembler, a job the company believed it could mold to accommodate Mr. Ford's medical restrictions. The job, however, required Mr. Ford to work first shift and to purchase tools costing several hundred dollars.

(8) Mr. Ford was unable to accept Landoll's job offer. First, due to the unrelated neck injury, Mr. Ford had medical restrictions against working. Second, he did not have any means to travel the 60 miles between his home and work. Needing transportation, Mr. Ford asked Landoll's human resources manager, Ramona Wienck, if the company would either advance him money for a car or schedule him for a different shift, which might allow him to catch a ride with another employee. But the company refused both requests.

(9) At the time of the regular hearing held in May 1997, Mr. Ford remained off work due to the medical restrictions for his neck and was waiting to see another physician to determine if he needed neck surgery or if he could begin a vocational education program that SRS had devised.

(10) As a result of the November 1995 back injury, Mr. Ford has a whole body functional impairment somewhere between the 15 percent rating provided by board-certified orthopedic surgeon Dr. Edward J. Prosti and the 0 to 5 percent rating provided by Dr. Ebelke. The Appeals Board rejects the argument of Landoll and its insurance carrier that Mr. Ford sustained no permanent injury or functional impairment as a result of the accident in question. Considering the ratings provided by both doctors, the Appeals Board finds Mr. Ford has a 9 percent whole body functional impairment due to this back injury.

(11) Since last working for Landoll Corporation, Mr. Ford has been unable to find employment. When he testified in July 1996, he had applied for work in Marysville and Belleville, Kansas, as well as Fairbury, Nebraska. Considering the challenges created by his lack of transportation and medical limitations, the Appeals Board finds that Mr. Ford has made a good faith effort to find appropriate employment following his work-related accident.

CONCLUSIONS OF LAW

(1) Mr. Ford has proven he was temporarily and totally disabled from January 11, 1996, through April 1, 1996. The request for temporary total disability benefits after that period is not supported by the record.

(2) Because his is an “unscheduled” injury, Mr. Ford’s entitlement to permanent partial general disability benefits is governed by K.S.A. 44-510e, which provides in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

That statute, however, must be interpreted in light of Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995) and Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). In Foult, the court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that the employer offered that paid a comparable wage. In Copeland, the court held for purposes of the wage loss prong of K.S.A. 44-510e, a worker’s post-injury wage would be based upon ability rather than actual wages when the worker failed to put forth a good faith effort to find appropriate employment after recovering from the injury.

(3) From the date of accident until January 11, 1996, Mr. Ford continued to work for Landoll performing light duties. For that period that Mr. Ford continued to work for Landoll and continued to earn a comparable wage, the permanent partial general disability is limited to the 9 percent whole body functional impairment rating.

(4) For the period following the 11.57 week period that he was temporarily and totally disabled, Mr. Ford has established a 100 percent difference in pre- and post-injury earnings. Although he had made a good faith effort to find appropriate employment, Mr. Ford remained unemployed at time of regular hearing.

(5) Mr. Ford has failed to prove the percentage of his former work tasks that he can no longer perform as a result of the back injury. Although the record does contain general descriptions of jobs that Mr. Ford previously performed, those jobs are not broken down into work tasks. Because K.S.A. 44-510e requires a percentage of task loss instead of job loss, Mr. Ford has failed to prove this prong in the permanent partial general disability formula.

(6) Averaging a 0 percent task loss with the 100 percent wage loss yields a 50 percent permanent partial general disability upon which Mr. Ford's award should be based.

(7) Mr. Ford is entitled to an award for the authorized medical benefits previously provided. Should medical treatment be needed in the future, Mr. Ford may request such medical benefits in an appropriate application to the Director of the Division of Workers Compensation.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated July 22, 1997, entered by Administrative Law Judge Bryce D. Benedict should be, and hereby is, modified to alter the award of temporary total disability benefits, as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Gregory K. Ford, and against the respondent, Landoll Corporation, and its insurance carrier, National Union Fire Insurance Co. N.Y., for an accidental injury that occurred on November 15, 1995, and based upon an average weekly wage of \$351.53 for 11.57 weeks of temporary total disability compensation at the rate of \$234.37 per week or \$2,711.66, followed by 207.50 weeks at the rate of \$234.37 per week or \$48,631.78, for permanent partial general disability, making a total award of \$51,343.44.

As of September 15, 1998, there is due and owing claimant 8.14 weeks for a 9% permanent partial general disability for the period from November 15, 1995, through January 10, 1996, at the rate of \$234.37 per week, or \$1,907.77, followed by 11.57 weeks of temporary total disability compensation at the rate of \$234.37 per week, or \$2,711.66, followed by 128.15 weeks of permanent partial disability compensation at the rate of \$234.37 per week in the sum of \$30,034.52 for a total of \$34,653.95, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$16,689.49 is to be paid for 71.21 weeks at the rate of \$234.37 per week, until fully paid or further order of the Director.

Should medical treatment be needed in the future, claimant may file an appropriate application with the Director.

The remaining orders set forth in the Award are hereby adopted by the Appeals Board as its own to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of September 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, KS
Frederick J. Greenbaum, Kansas City, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director